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Sent: Wednesday, December 21, 2016 6:00 PM
To: 'Bob.Martineau@tn.gov'
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Subject: SELC, et al., letter re: TVA noncompliance with federal CCR Rule
Attachments: 2016_12_21_Letter re TVA Noncompliance with Federal Coal Ash Rule.PDF

Dear Commissioner Martineau:

Please find attached a letter alerting TDEC to several violations of the federal Coal Ash Rule by the Tennessee Valley Authority. Together with Earthjustice, Environmental Integrity Project, Sierra Club Beyond Coal Campaign, Sierra Club Tennessee Chapter, Southern Alliance for Clean Energy, and Tennessee Clean Water Network, we urge TDEC to exercise its authority under the Commissioner's Order to immediately take action to prevent TVA from moving forward with closure of coal ash storage and disposal areas in Tennessee until such time as TVA complies with the minimum requirements of the federal Coal Ash Rule.

You will find the documents referenced in the attached letter in the Sharefile link below:

<https://southernenvironment.sharefile.com/d-sb01536e53e242548>

Sincerely,
Amanda

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December 21, 2016

Robert J. Martineau, Jr.
Commissioner
Tennessee Department of Environment and Conservation
William Snodgrass Tower
312 Rosa L. Parks Avenue, 2nd Floor
Nashville, Tennessee 37243

Via email to Bob.Martineau@tn.gov

Re: **TVA's Noncompliance with Federal Coal Ash Rule and State Law Governing Closure of Coal Ash Ponds; TDEC Oversight of TVA's Implementation of Federal Coal Ash Rule Pursuant to the Commissioner's Order, OGC15-0177**

Dear Commissioner Martineau:

We are calling on TDEC to exercise its authority under the Tennessee Solid Waste Disposal Act ("Disposal Act") and Section VII.D of the Multisite Commissioner's Order, OGC15-0177 ("Commissioner's Order" or "Order"), to immediately require the Tennessee Valley Authority ("TVA") to comply with the federal Coal Ash Rule, 40 C.F.R. §§ 257.50-107 ("Coal Ash Rule" or "Rule"), before TVA moves forward with closing any of the coal ash disposal areas that are subject to the Order.

The documents posted on TVA's compliance website,¹ or lack thereof, together with information we have compiled through various administrative processes, demonstrate that TVA is violating the Coal Ash Rule in four key ways. First, TVA fails to identify a significant number of inactive surface impoundments in Tennessee as subject to the Rule. Second, TVA fails to post closure plans and other required compliance documents for several inactive impoundments at Kingston, Bull Run, and John Sevier, despite its stated intention to close the ponds in the immediate or near future. Third, TVA improperly invokes the beneficial use exception to the Coal Ash Rule to engage in "sham disposal" at Bull Run without complying with the requirements that apply to new landfills. Finally, TVA fails to demonstrate that its plans to cap coal ash ponds in place satisfy the applicable performance standards under the Rule. This is evident in the handful of closure plans that TVA has posted for ash impoundments at the Cumberland Fossil Plant and others.

¹ TVA, [CCR Rule Compliance Data and Information](https://www.tva.gov/Environment/Environmental-Stewardship/Coal-Combustion-Residuals) (December 16, 2016 3:24 pm), <https://www.tva.gov/Environment/Environmental-Stewardship/Coal-Combustion-Residuals>.

TVA's vague, cookie-cutter closure plans universally lack sufficient detail to allow the State and citizens to evaluate TVA's compliance. These wholly inadequate plans, in addition to TVA's failure to even post such plans for a significant number of ash impoundments in Tennessee, undermine the fundamental premise of transparency upon which enforcement of the federal Coal Ash Rule is based.² The Commissioner's Order shares the goal of establishing a "transparent, comprehensive process" for addressing TVA's coal ash pollution.³ TDEC can and must exercise its authority under Section VII.D of the Order to require TVA to comply with the Coal Ash Rule.

Strong action by TDEC is particularly warranted because one stated purpose of Section VII.D of the Commissioner's Order is "to insure coordination and compliance with Tennessee laws and regulations that govern the management and disposal of CCR."⁴ TDEC's own inspection reports, as well as other public documents, show that TVA is moving forward with closure-related construction at several of its ponds. If TVA does not adequately comply with the federal Coal Ash Rule, TDEC cannot meaningfully evaluate whether TVA's plans and actions are consistent with either the Disposal Act or the minimum federal requirements of the Rule itself.

Despite committing to closing its ash ponds eight years ago, TVA has dragged its feet, leaving these leaking, unlined pits to pollute our groundwater, rivers and streams. Now TVA proposes to do the same permanently, without complying with the bare minimum standards that EPA developed in response to TVA's massive coal ash spill at Kingston.

TDEC cannot continue to countenance TVA's blatant disregard for state and federal laws designed to protect our public health, our drinking water, and our state's water resources. The State must require TVA to halt closure-related construction at all sites, extensively supplement and revise its Coal Ash Rule-related plans and assessments, and comply with the Rule before it moves forward with permanently covering up its ash in unlined, leaking pits next to our rivers and streams.

I. To protect public health and the environment, TDEC should require TVA to comply with minimum requirements in the federal Coal Ash Rule.

Section VII.D of the Commissioner's Order provides for a "Department Review Process" to allow TDEC to review and evaluate TVA's "CCR rule related plans, demonstrations, and assessments, after they are placed on TVA's public CCR rule website."⁵ Under the Order, TVA

² U.S. EPA, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; Final Rule, 80 Fed. Reg. 21,302, 21,339 (Apr. 17, 2015); as amended by Technical Amendments to the Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities—Correction of the Effective Date, 80 Fed. Reg. 37,988 (July 2, 2015) [hereinafter Coal Ash Rule] ("These transparency requirements serve as a key component by ensuring that the entities primarily responsible for enforcing the requirements have access to the information necessary to determine whether enforcement is warranted.").

³ *In re Tenn. Valley Auth.*, No. OGC015-0177, 1 (Tenn. Dep't of Env't & Conservation Aug. 8, 2015) [hereinafter Commissioner's Order], https://tn.gov/assets/entities/environment/attachments/TVA_Order_8-6-15.pdf.

⁴ *Id.* 1.

⁵ *Id.* 9.

must notify TDEC when it posts “CCR-related documents on its CCR rule public website.”⁶ The Order also provides, “The Department in its discretion may request that TVA provide it electronic or paper copies of specific documents.”⁷ TDEC has 60 days to inform TVA whether it has comments on the plans. If TDEC has comments, TVA and TDEC will meet within 30 days after TDEC notifies TVA, and thereafter TVA “shall appropriately modify its plans, demonstrations, or assessments to respond to the Department’s final comments....”⁸ TVA may not move forward with its plans until 30 days after it resubmits its plans, and it may only do so if it has not heard otherwise from TDEC.⁹ Thus, under Section VII.D of the Order, TDEC can and should exercise oversight of TVA’s compliance with the minimum standards set forth in the federal Coal Ash Rule.

Ensuring TVA’s compliance with the Rule’s requirements for analyzing stability risks and evaluating the ability of a particular site to satisfy performance standards for closure *before* TVA caps its ponds in place is particularly crucial to protect the public from undue risks while TDEC performs a more extensive investigation under Section VII.A of the Commissioner’s Order. In addition to protecting public resources like our drinking water, requiring compliance with the Coal Ash Rule may also save TVA ratepayers the expense of paying for a cover system that will not work to protect the public from pollution and catastrophic dam failure, only to have to pay again later for clean up after a spill or continuing violations of the state or federal laws designed to protect our clean water.

II. TVA is violating the federal Coal Ash Rule by failing to post required closure plans and other information for many coal ash disposal areas in Tennessee.

The Coal Ash Rule is designed to be self-implementing, meaning owner/operators are required to comply and provide the public, including the State, with specific required information demonstrating their compliance by posting that information on a public website. The State and private citizens can then enforce the Rule as necessary.¹⁰ Below we explain that TVA is violating the Rule because it has not posted required information for several categories of surface impoundments in Tennessee.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* 9-10.

⁹ *Id.* 10.

¹⁰ Under section 2301 of the “Water Infrastructure Improvements for the Nation Act,” which amends section 4005 of the Resource Conservation and Recovery Act, EPA may also enforce the Rule. The amendments are available at <https://www.congress.gov/bill/114th-congress/senate-bill/612/text#toc-H91A0B3DCF1D14C6C92588DDAA897B03B>.

A. TVA fails to identify and post information for several surface impoundments subject to the Rule.

Under the federal Coal Ash Rule, a “CCR surface impoundment” means a “natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the unit treats, stores, or disposes of CCR.”¹¹ A “CCR landfill” means “an area of land or an excavation that receives CCR and which is not a surface impoundment...”¹² An “inactive CCR surface impoundment” means a CCR surface impoundment that no longer receives CCR after October 19, 2015 and still contains both CCR and liquids on or after October 19, 2015.¹³ Inactive surface impoundments are subject to all of the requirements applicable to existing CCR surface impoundments.¹⁴

The Rule applies to both existing and inactive surface impoundments.¹⁵ As the Rule explains: “There is little difference between the potential risks of an active and inactive surface impoundment: both can leak into groundwater, and both are subject to structural failures that release wastes into the environment.”¹⁶ The Rule does not, however, apply to “CCR landfills that have ceased receiving CCR prior to October 19, 2015.”¹⁷ The Preamble recognizes that some surface impoundments were previously closed as landfills under state solid waste programs.¹⁸ EPA makes clear, however, that only surface impoundments that “no longer contain water and can longer impound liquid” are “closed” within the meaning of the Rule.¹⁹ Thus, identifying whether a particular CCR unit is an inactive surface impoundment or a landfill that ceased receiving CCR prior to October 19, 2015, is the key to determining the applicability of the Rule.

TVA appears to take the erroneous view that any CCR unit that has obtained a state landfill permit is a “landfill” rather than an “inactive surface impoundment,” and, if it ceased receiving CCR prior to October 19, 2015, is exempt from the Rule. But many CCR units in Tennessee that have state landfill permits were “designed to hold an accumulation of CCR and liquids,” store or dispose of CCR, and still contain both CCR and liquids, making them inactive surface impoundments within the meaning of the Rule. In many cases, these permitted landfills were constructed as surface impoundments and still contain coal ash waste submerged in groundwater. Examples include the following:²⁰

¹¹ 40 C.F.R. § 257.53.

¹² *Id.*

¹³ *Id.*

¹⁴ 40 C.F.R. § 257.100(a).

¹⁵ 40 C.F.R. § 257.50(b)-(c).

¹⁶ 80 Fed. Reg. 21343.

¹⁷ *Id.* § 257.50(d).

¹⁸ Coal Ash Rule, 80 Fed. Reg. 21343.

¹⁹ *Id.*

²⁰ This letter does not address Coal Ash Rule and state solid waste law compliance issues at Gallatin Fossil Plant because that plant is not identified as a site subject to the Commissioner’s Order. *See* Commissioner’s Order, Section VI. We are still in the process of reviewing documents related to the environmental investigation plans for the John Sevier and Watts Bar Plants. TDEC has not yet set due dates for environmental investigation plans for the Allen and Johnsonville Plants.

- 1) Bull Run: Bottom Ash Disposal Area
- 2) Bull Run: Gypsum Disposal Area
- 3) John Sevier: Dry Fly Ash Stack

SELC previously submitted technical comments to TDEC demonstrating that the two disposal areas at Bull Run contain ash submerged in 10-25 feet of groundwater and continue to hold both CCR and liquids.²¹ Indeed, in its letter to TVA regarding the environmental investigation plan at Bull Run required by Section A of the Commissioner's Order, TDEC stated, with regard to these two disposal areas, "[T]he reservoir elevation and groundwater elevations in monitoring wells at the site indicate waste is probably submerged in groundwater at the lower levels of the fill."²² At John Sevier, our initial review of documents provided by TVA to TDEC pursuant to Section A of the Commissioner's Order suggests that at least a portion of the Dry Fly Ash Stack may be below the water table.

Similarly, TVA assumes that even where it has no state landfill permit, as long as TVA drained the free water from a surface impoundment and stopped placing ash in the impoundment before October 19, 2015, that CCR unit is not subject to the Rule. That view is inconsistent with the plain language of the Rule. Several CCR units in Tennessee never obtained landfill permits, but were decanted or otherwise drained, ceased receiving CCR, but nevertheless continue to hold both ash and water. Examples include the following:

- 1) Kingston: Ball Field/Original Surface Impoundment
- 2) Kingston: Main Ash Pond
- 3) John Sevier: Site J
- 4) Allen: West Pond

SELC previously submitted technical comments to TDEC demonstrating that the Original Surface Impoundment/Ball Field and Main Ash Pond at Kingston are submerged in at least 20 and up to 40 feet of groundwater and continue to hold both CCR and liquids.²³ At John Sevier, our initial review of documents provided by TVA to TDEC pursuant to Section A of the Commissioner's Order suggests that at least a portion of Site J may be below the water table. We have not yet been able to review historical documents for the Allen West Pond, but based on its location adjacent to McKellar Lake and TVA's discussion of how the West Pond was drained in the EIS for Ash Impoundment Closure,²⁴ we believe it also contains coal ash submerged in groundwater. We anticipate that TDEC will conduct an investigation at Allen in the near future.

²¹ Letter to Chuck Head, TDEC, from Amanda Garcia, SELC, re: Bull Run Fossil Plant: Commissioner's Order; Final Ash Pond Closure Plan; Beneficial Use Determination (July 22, 2016), and accompanying attachments [hereinafter SELC Letter to TDEC re: Bull Run Fossil Plant].

²² Letter from Chuck Head, TDEC, to Paul Pearman, TVA, re: TVA Bull Run Fossil Plant Environmental Investigation Plan Due Date- January 9, 2017 (September 13, 2016) [hereinafter TDEC Letter re: Bull Run EIP].

²³ Global Environmental, LLC, Technical Comments Regarding the Environmental Investigation Plan (Revision 0, September 16, 2016), TVA Kingston Plant, 11-15 (November 2016), prepared on behalf of SELC [hereinafter SELC Comments on Kingston EIP].

²⁴ Compare TVA, Draft Ash Impoundment Closure Environmental Impact Statement Part II (Allen), 1 (December 2015) (describing water being "pumped out" from the West Pond) [hereinafter DEIS] with TVA, Final Ash

The CCR units identified above are “inactive surface impoundments” that are subject to the Rule. TDEC must compel TVA to comply with the requirements of the Coal Ash Rule at these impoundments, including requirements to conduct stability-related assessments, perform monthly and annual inspections, develop groundwater monitoring systems, develop closure plans, satisfy performance standards for closure in place, and post all compliance documents to a publicly accessible website prior to undertaking any construction at these units.²⁵

B. TVA fails to post closure plans and related information for several surface impoundments it plans to close in the immediate or near future.

In addition to improperly exempting some inactive surface impoundments from the Rule altogether, TVA also attempts to evade requirements in the Coal Ash Rule to post closure plans and related information for certain inactive surface impoundments that it plans to close in the immediate future.

As originally promulgated, the Coal Ash Rule included a provision that would exempt certain inactive surface impoundments that submitted a notice of intent (“NOI”) to close by a date certain from design and operating criteria, groundwater monitoring and submission of closure and post-closure plans (the “early closure loophole”). TVA took advantage of this provision, submitting NOIs for the Fly Ash Pond and Sluice Channel at Bull Run, the Stilling Pond and Sluice Trench at Kingston, and the Bottom Ash Pond at John Sevier.

However, as a result of partial settlement of litigation regarding the federal Coal Ash Rule currently pending in the United States Court of Appeals for the District of Columbia, the court granted an unopposed motion by EPA to vacate the early closure loophole.²⁶ EPA subsequently promulgated a direct final rule that amends the Rule to require inactive surface impoundments to comply with all of the requirements that apply to existing surface impoundments, including the design and operating criteria, groundwater monitoring and submission of closure and post-closure plans.²⁷ The direct final rule requires owners and operators who filed NOIs for early closure of inactive surface impoundments to prepare closure plans and a series of assessments to support design criteria and operating criteria “no later than April 17, 2018.”²⁸ In contrast, inactive and active surface impoundments for which no NOI was

Impoundment Closure EIS Part I-Programmatic NEPA Review and Part II-Site-Specific NEPA Review, Part II (Allen) 1 (June 2016) (asserting that the West Pond does not impound water) [hereinafter FEIS Part I and FEIS Part II]; SELC et al., Comments on Draft Ash Impoundment Closure Environmental Impact Statement 43 (Mar. 9, 2016) [hereinafter Comments on DEIS].

²⁵ See 40 C.F.R. § 257.100(a); 40 C.F.R. §§257.71, 257.73, 257.80, 257.82, 257.83, 257.90-98, 257.102.

²⁶ Order, *Utility Solid Waste Activities Group v. Environmental Protection Agency*, No. 15-1219 (D.C. Cir. June 14, 2016).

²⁷ U.S. E.P.A., Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Extension of Compliance Deadlines for Certain Inactive Surface Impoundments; Response to Partial Vacatur, 81 Fed. Reg. 51802-51808 (August 5, 2016) [hereinafter Direct Final Rule].

²⁸ 40 C.F.R. § 257.102(e), as amended by the Direct Final Rule (emphasis added).